

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALAN DAVIS,

Defendant-Appellant.

UNPUBLISHED
September 8, 1998

No. 199551
Kent Circuit Court
LC No. 96-000423 FH

Before: Holbrook, Jr., P.J., and Wahls and Cavanagh, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3), and sentenced to 30 to 48 months' imprisonment. He now appeals of right, contending, first, that the negligence of the trial judge in damaging a tape recording introduced into evidence deprived him of a fair trial when the jury was thereby prevented from rehearing the tape, as it requested, during its deliberations, and that his sentence is disproportionate to the offense and the offender. We affirm.

The trial court's accidental destruction of a portion of the tape recording is regrettable, but did not deprive defendant of a fair trial where the jury had already twice heard the tape recording as well as testimony concerning the contents of the recording, and defendant's due process rights were in no way infringed. *People v Amison*, 70 Mich App 70, 80-83; 245 NW2d 405 (1976). Furthermore, it was indicated on the first day of trial by the prosecutor that a copy of the tape recording, as part of requested defense discovery, had been provided to defense counsel prior to trial; if the need for the jury to rehear the testimony was viewed by defense counsel at trial as crucial to his client's cause, it would have been a simple matter to request time to substitute the copy of the recording and have it played for the jury.

There are no guidelines for the offense, but even if the guidelines for a precursor offense were relevant, the test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997). Given the nature of the injuries inflicted, indications that this was

merely part of a pattern of such misconduct and child abuse, the fact that the offense was committed while defendant was on probation, and the severity of the injuries inflicted, the sentence imposed was proportionate to the perversity of the act perpetrated and the offender. *Lemons, supra*.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Myron H. Wahls

/s/ Mark J. Cavanagh